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ABSTRACT

Designed for employees of elementary schools, with a section relevant to the Indian Health Service and Bureau of Indian Affairs, this document answers questions concerning the Family Educational Rights and Privacy Act (FERPA). The guide is written in question and answer form; questions are organized around related issues. Provisions not applicable to elementary schools have been omitted. "Purpose and Applicability" deals with the purpose of the Act, to whom it applies, and kinds of records involved. "School District Requirements" is concerned with the regulation of school district policy under the Act. The next section defines "directory information" and outlines the rules governing it. "Parents' Rights" details parents' rights to inspect their child's education records and tells under what circumstances they can add to or change those records. The next section defines disclosure, details the limits which apply to disclosure without parental consent, and describes the conditions or limits involved in transferring student records to another school. The guide also answers questions concerning enforcement of the Act. The final section compares FERPA provisions with those of Public Law 94-142, Education for All Handicapped Children Act (1975), and discusses the implementation of Public Law 94-142 and the protection of confidentiality. A memoranda concerning use of Indian Health Service records by the Bureau of Indian Affairs is appended. (CM)

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ED204077

QUESTIONS ABOUT FERPA

The Family Educational Rights and Privacy Act

(The Buckley Amendment)

BIA/IHS Edition

Robert T. Reeback, Ph. D.

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
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January, 1981

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RC 012793

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INTRODUCTION

The Family Educational Rights and Privacy Act (FERPA) also known as the Buckley Amendment, requires school districts to establish and publish a policy regarding student records and their accessibility. The Act assures students (and parents) access to their own records and the opportunity to request changes or add qualifying statements to those records. It was not intended to obstruct the operations of educational institutions and, in fact, specifically states that student records may be forwarded to other schools when a student transfers.

This guide, written in question and answer form, does not follow the order of the Act. Questions are organized around related issues. The information contained here has been reviewed and revised by the FERPA Office. We have omitted provisions that do not apply to elementary schools. FERPA applies to any educational activity receiving funds from the U. S. Department of Education. The final section compares FERPA provisions with those of Public Law 94-142, Education for All Handicapped Children Act of 1975.

Those who would like to obtain a copy of the Act, the pertinent regulations, or additional material about FERPA, and those with questions, should contact:

Family Educational Rights and Privacy Act
(FERPA) Office
Department of Education
4511 Switzer Building
Washington, D.C. 20202

Telephone: (202) 245-0233

Two other acts which deal with release of information may sometimes be confused with FERPA. They are the **Freedom of Information Act** and the **Privacy Act.** The Freedom of Information Act of 1966 allows public access to identifiable records of administrative agencies in the executive branch of the Federal government. The Act does not cover State and local governments. The Privacy Act (P.L. 93-579) of 1974 was designed to give citizens more control over what information is collected about them by the Federal government. It requires Federal agencies to report publicly the existence of all systems of records maintained on individuals. Both these Acts are described in detail, as well as procedures for obtaining information, in Washington Information Workbook (pp. 233-256), published by Washington Researchers, 918 Sixteenth Street, N.W, Washington, D.C. 20006.

The Bureau of Indian Affairs (BIA) and Indian Health Service (IHS) are subject to the Privacy Act. Representatives of BIA, IHS and their respective legal counsels met in 1977 to discuss the proper use of IHS medical records by the BIA to assure education to Handicapped Indian Children in light of the Privacy Act.

It was the concensus of that meeting that BIA, while implementing P.L. 94-142, would be a routine user of the IHS Health and Medical Records Systems. Memoranda to that effect from the Director of Indian Health Service, the IHS Privacy Act Coordinator and the Senior Attorney, Public Health Division, are included in this guide, pages 12-16.

PURPOSE AND APPLICABILITY

1. What is FERPA?

The Family Educational Rights and Privacy Act is a Federal law, passed in 1974.

2. To whom does the law apply?

To all educational agencies or institutions, private as well as public, that receive Federal funds for education from the Department of Education. Examples are elementary schools, high schools, colleges, vocational schools, school districts, universities, professional schools. FERPA does not apply to Head Start.

3. What is the purpose of the law?

- o To protect the privacy of parents and students;
- o To regulate who may see, and who may not see, student's educational records;
- o To assure parents' access to students' records;
- o To limit schools' disclosure of students' records;
- o To give parents a chance to request corrections of students' records.

In general, the Act gives rights to parents of younger students—those in secondary school or younger. Once a student is past age 18, or is past the 12th grade, the Act gives the rights to the student himself, and not to his parents. Since these materials are addressed mainly to people who work in elementary schools, we will refer simply to parents' rights from here on.

4. What kinds of records does the Act deal with?

The Act deals with education records, which includes any information, written or recorded some other way, that is about a student and that is kept by a school, college or university.

5. What kinds of records are not covered by the Act?

Even though some of the following kinds of information might be found at a school, they are not education records under the Act:

- o Notes that a teacher (or counselor or administrator) makes for his own use and doesn't show to anyone else, except to a substitute teacher;
- o Records that a school's security division or law enforcement unit keeps. But a school's law enforcement records are exempt from the Act only if (1) that unit keeps them only for law enforcement purposes, and shows the records to no one but law enforcement officials in the same jurisdiction, and (2) the school will not let its law enforcement unit see education records;
- o Employment records about employees of the school;
- o Alumni records.

SCHOOL DISTRICT REQUIREMENTS

6. What does the Act require a school district to do?

- o To let parents see their children's education records;
- o To let parents request that the school correct their children's records;
- o To let parents exercise their limited rights to control disclosure of their children's records;
- o To adopt a policy about records;
- o To notify parents of all the items listed above;
- o To notify parents that they have the right to complain about violations.

7. What does the Act forbid a school district to do?

- o To keep parents from seeing their children's records;
- o To allow unauthorized people or agencies to see the records (see questions 17 and 18, below, for authorized disclosure without parents' prior consent).

8. What kind of policy does the Act require school districts to adopt?

- o The Act requires every school district (college, etc.) covered by the Act to adopt a policy about educational records. Many details of the policy are left to the school district to decide.

- o However, the Act requires that every policy about records commit the district to:

  (1) Informing parents of their rights under the Act;

  (2) Permitting inspection and review of records by parents;

  The policy must include:
  (a) How to request access to records;
  (b) When a request for copies will be denied;
  (c) What the fees are for copies;
  (d) A list of types of records kept, of places where the records are, and of who keeps them.

  (3) Not disclosing records that can be traced to a student without prior written consent (see question 18, below, for exceptions);

  The policy must indicate:
  (a) How the school will decide who is a "school official" and what is a "legitimate educational interest;"
  (b) Whether or not the school will disclose records to those officials who have such an interest without prior consent;
  (c) What information will be considered "directory information," and thus, will be disclosed.

  (4) Keeping for inspection a record of who requested or received students' records, and why (see the last paragraph under question 23, below);

(5) Permitting parents to seek to correct or change students' records, and permitting them to place a statement in students' records (see question 15, below).

9. Must the school district publish the policy?

The policy adopted has to be in writing, and it has to be made available to parents on request. Furthermore, the school district must inform parents each year of their rights (under the Act, the regulations, and the school districts' policy), including their right to file complaints, and must tell them where they can get copies of the policy.

How the district accomplishes this is up to the district, as long as the method is reasonably likely to inform. Elementary and secondary schools are also responsible for effectively notifying parents of students whose home language is not English.

10. What fees can a school district charge for copying or other services it supplies in complying with the Act?

The school district is not allowed to charge any fee to search for and retrieve a student's records. However, the district is allowed to charge a fee for copies of records as long as the fee is not so high that it prevents parents from inspecting and reviewing the records.

11. Does the Act prevent a school district from destroying education records?

The only restrictions on destroying records are these:

- Where there is an outstanding request to inspect and review education records, those particular records may not be destroyed;
- An explanation added to a record by a parent after a hearing has to be kept as long as the whole record is kept, or as long as the part explained is kept;
- The school's record of who requested and received a student's records, and why, must be kept as long as that student's records are kept.

DIRECTORY INFORMATION

12. What is directory information?

Personally identifiable information from a student's education records that schools normally provide to the general public. Examples are: The student's name, address, phone number, date and place of birth, major field of study, school activities and sports, height and weight for those on athletic teams, dates the student attended the school, degrees or awards the student received, previous school, and other similar information.

13. What are the special rules concerning directory information?

The school district has to give public notice of:

- o What items the school district intends to treat as directory information;
- o The parent's right to refuse to permit the school district to disclose any or all of those items without the parent's consent;
- o The time limit for telling the district in writing if the parent so refuses.

PARENTS' RIGHTS

(FERPA gives parents many rights in addition to those discussed in questions 14 and 15 below. See, for example, questions 3, 6, 8, 9, 13, and 23.)

14. What is included in a parent's right to inspect and review education records?

When a parent wants to examine his child's education records, the school the student attends (or attended) has to permit him to do so within a reasonable time (45 days or less).

The school has to answer a parent's reasonable requests for explanation or interpretation of the records.

The school must provide the parent with copies of the records if the parent would be unable to inspect and review the records without getting the copies.

If no one has shown the school evidence to the contrary, the school can assume that either parent has the right to inspect and review records, and the school can go ahead and allow either parent to do so, including a non-custodial parent.

Parents can examine only the records that pertain to their child.

15. Under what circumstances can a parent add to or change his child's education records?

Parents cannot themselves change the records, but they can request the school to change or correct the records. If the school refuses to make the change, parents have the right to put an explanation into the records. However, a school can refuse to let a parent challenge an accurately recorded grade that a teacher assigned for a whole course.

A parent can request that the school change the education record whenever the parent believes that the record is inaccurate, misleading, or that it violates the student's privacy or violates some other rights of the student.

When a parent requests a change other than altering a course grade, the school must decide within a reasonable time either to make the change, or to tell the parent it refuses to do so and advise the parent that he has a right to a hearing. The hearing must meet standards of fairness that are given in the regulations,

for example, notice, impartial hearer, right to give evidence, right to counsel. If, after the hearing, the school's decision is still that no change is required, the school must tell the parent that he can place an explanation in the records.

In cases where the parent does place an explanation in the records, that explanation must be kept as long as the pertinent records are kept, and the school must disclose the explanation when it discloses the pertinent records.

DISCLOSURE AND TRANSFER OF RECORDS

16. What is disclosure?

Permitting any individual, agency, or any institution or organization to have access to a student's education records, or to information in the records that can be traced to the student, is disclosure. So is any release, transfer, or communication of such records or such information to anyone, whether the communication is spoken, written, electronic or by any other means.

17. When is a school district permitted to disclose a student's education records?

In general, the Act permits a school district to disclose education records under these circumstances:

(1) When the parent has given his prior written consent to the disclosure (see question 24, below);

(2) Without the parent's prior consent, but only:

- (a) When the party to whom the records will be disclosed is among those to whom the Act specifically permits disclosure without prior consent (see question 18, below);
- (b) In a health or safety emergency;
- (c) To comply with a court order;
- (d) When the disclosure is to the parent or student himself;
- (e) When the information disclosed cannot be traced to an individual student;
- (f) When the information disclosed is what the regulations call "directory information," and the school district has followed the special rules that apply to directory information (see questions 12 and 13, above).

18. To whom do the regulations specifically allow disclosure without the parents' prior consent?

In addition to the situations given under question 17 (b through f), records can be disclosed without prior consent in these situations:

- o To teachers and other school officials within the student's present school or district who have a "legitimate educational interest" (see question 8, above, under (3));
- o To school officials in a school or district that the student intends to enroll in, or is transferring into;
- o To authorized representatives of the U. S. Comptroller General, of the Secretary of Education, and of State educational authorities;

- o When a State statute adopted before November 19, 1974, specifically requires information to be reported or disclosed to State or local officials;
- o To an educational research organization while it is conducting a study for a school or district concerned with tests, student aid programs, or improvement of instruction;
- o To accrediting organizations for accrediting purposes;
- o To parents of a dependent student as defined in the Internal Revenue Code of 1954, Section 152.

19. What special limitations apply when the Act permits disclosure without consent?

There are special conditions imposed in several of those situations, especially in the cases of transfer of records (see question 20, below), disclosure to Federal and State officials (see question 21, below), and health and safety emergencies (see question 22, below).

20. What are the conditions or limits that apply to transferring records to another school?

Even though the parent's prior consent is not required, the student's present school must attempt to notify the parents of the transfer of records, unless the parent initiated that transfer of records. **However, where the school's policy includes a statement that records are forwarded on request in transfer cases, no additional notice is needed.**

If the parent requests it, the school must provide him with a copy of the records transferred, and with a hearing for challenging those records. Two schools that both serve the same student can exchange information from education records without prior consent.

21. What are the conditions or limits that apply to disclosure without consent to Federal and State officials?

Disclosure to the Federal and State officials listed earlier (in question 18) is for evaluation and audit of Federally supported education programs, or for enforcement of Federal legal requirements related to such programs.

When those officials collect information, it has to be treated so as to prevent anyone other than those officials from tracing it to the students or their parents, and any information that is identifiable has to be destroyed when it is no longer needed for the purposes just stated.

22. What are the conditions or limits that apply to disclosure without consent in emergencies?

Knowledge of the information has to be necessary to protect the health or safety of the student or others, and the person to whom the information is disclosed has to be someone who is in a position to deal with the emergency.

23. Can anyone to whom records are disclosed turn around and redisclose them to someone else?

The Act and regulations attempt to limit redisclosure. Whenever a school discloses information that can be traced to a student, the school must tell the one who receives the information that disclosure is made only on this condition: that the receiver will not turn around and redisclose it without the parent's written consent. How the school will handle this is not specified in the Act.

A receiver with employees, officers, or agents—for example, an organization—can let those persons have the information it got from the school. However, that kind of redisclosure can only be done for the purpose that prompted the original disclosure.

Further, for certain kinds of disclosures, the school must keep a record that shows who requested or obtained the information, and for what purposes. Parents have the right to examine that record. The only situations where a school does not have to keep a record of the disclosure are these:

- o When the information is going to the parent or to a school official at the child's present school;
- o When the information cannot be traced to the student or parents;
- o When the information is "directory" information (see question 12, above);
- o When the parent has specifically consented, in writing, to disclosure to a particular person or agency.

24. What constitutes prior consent to disclosure?

A written consent obtained before any disclosure is made, signed by the parent and dated, showing which records will be disclosed and for what purpose, and indicating to whom the disclosure will be made, satisfies the requirements for a prior consent to any given disclosure.

ENFORCEMENT

25. What happens if the school violates FERPA?

The most severe possible penalty is that the Secretary of Education cuts off the district's Federal education funds (see question 26, below).

26. How is FERPA enforced?

The FERPA Office, Department of Education, 4511 Switzer Building, Washington, D.C. 20202, investigates violations and reviews complaints about violations of the Act. Complaints must be in writing. When the Office finds noncompliance, it notifies the violator of how to bring itself into compliance. The Office tries to secure voluntary compliance.

Only when voluntary compliance cannot be obtained will the Office send a case to the Review Board for hearing. There are procedural safeguards to insure that hearings by the Review Board are fair.

The Office, and the Review Board, can require school districts to send reports, to keep records, and to give the Office or Board access to those records.

The Secretary of Education has the power to review decisions of the Review Board. Where the Secretary finds there has been a failure to comply with the Act and that voluntary compliance cannot be obtained, the Secretary can stop making Federal education funds available until the violating school or district complies.

FERPA AND P. L. 94-142

The following comments compare some requirements concerning records under P.L. 94-142 with those under FERPA. This comparison does not exhaust the topic, and it is not intended to replace the Acts and Regulations themselves. For another, somewhat different comparison, see Suggestions for Compliance with Privacy Rights of Parents and Students: Buckley Amendments and Education of Handicapped Act, Arizona Department of Education, Revised August, 1980. This document also contains sample forms for collection and transfer of student records.

P.L. 94-142 (the Statute)

Like FERPA, P.L. 94-142 has provisions: (1) to assure parents' access to their children's records; and (2) to protect the confidentiality of those records.

For assuring access, P.L. 94-142 states its own requirements, analogous to FERPA's. For protecting confidentiality, P.L. 94-142 explicitly relies on FERPA.

Assuring Access

P.L. 94-142 imposes various conditions for receiving funds:

(1) For a State to qualify for assistance under P.L. 94-142, the LEAs in that State must maintain records of the individualized educational program for each handicapped child. (FERPA applies to records that schools maintain, but does not itself order schools to maintain any particular records.)

(2) With respect to the identification, evaluation or educational placement of a handicapped child, or the provision of a free public education to that child, states and LEAs must also guarantee the following under P.L. 94-142:

- o That parents have an opportunity to examine all records concerning identification, etc.;

- That parents will receive notice whenever a school proposes to change—and, likewise, whenever it refuses to change—the identification, etc.;
- That parents have both the opportunity to present complaints concerning the identification, etc., and the opportunity for an impartial hearing of their complaint, with due process safeguards;
- That parents have an opportunity to obtain an independent educational evaluation of their child.

Protecting Confidentiality

P.L. 94-142 directs the Secretary of Education to take appropriate action "in accordance with" FERPA to assure the confidentiality of records of handicapped children, and instructs the Secretary to issue regulations to carry out that direction.

This protection of confidentiality extends to "any personally identifiable data, information, and records collected or maintained by the Commissioner and by State and local educational agencies pursuant to [P.L. 94-142]."

Regulations Implementing P.L. 94-142

The similarity of P.L. 94-142 provisions about records to FERPA provisions becomes even more obvious when the regulations that implement the two Acts are examined. Regulations that implement P.L. 94-142 sometimes explicitly adopt regulations under FERPA, sometimes track FERPA regulations with minor adjustments, and sometimes preserve the structure of the FERPA approach to records, but not the same content.

Even though the two sets of regulations are similar, here are a few points where they diverge:

To whom the act applies . . .

- P.L. 94-142 regulations apply to "participating agencies."
- FERPA applies to any educational agency or institution that gets Federal funds for education through the U. S. Department of Education.

The definition of "participating agency" in P.L. 94-142 regulations includes:

- Any agency or institution that collects, maintains, or uses personally identifiable information under the P.L. 94-142 regulations;
- Any agency or institutuion from which information is obtained under the P.L. 94-142 regulations.

So it is possible for any agency that is not subject to FERPA regulations directly to become subject to them indirectly, through P.L. 94-142.

An example might be a Head Start agency, whose funds do not come through the U. S. Department of Education, but whose records are used in the identification, evaluation, or educational placement of handicapped children in free public education.

Destruction of records . . .

The P.L. 94-142 regulations have more details than do the FERPA regulations concerning the destruction of records.

A public agency that keeps the records for purposes of P.L. 94-142 must tell the parents when personally identifiable information is no longer needed to provide educational services to a handicaped child.

The agency must destroy such unneeded information when the parents request that it be destroyed. Upon such a request, the only records collected for P.L. 94-142 that an agency can keep forever are the student's name, address, phone number, grades, attendance record, classes attended, grade level completed, and year completed.

Procedures concerning confidentiality . . .

The P.L. 94-142 regulations require each participating agency to:

- o Assign one official to be responsible for insuring confidentiality;
- o Train everyone at that agency who collects or uses personally identifiable information in the State's policies and procedures for safeguarding confidentiality;
- o Keep a list of the names and positions (for FERPA, positions is enough) of its employees who may have access to personally identifiable information.

Disclosure without consent . . .

The P.L. 94-142 regulations on disclosure of records without parents' consent are quite similar to FERPA's, but with these peculiarities:

- o A participating agency under P.L. 94-142 is permitted to disclose personally identifiable information without the parents' consent, only if it is:
  - (1) Used "for meeting a requirement" of the P.L. 94-142 regulations;
  - (2) Disclosed to officials of participating agencies collecting or using the information under the P.L. 94-142 regulations;
- o The State Education Agency must provide policies and procedures to use in the event a parent refuses to consent to disclosure.
- o While the consent discussed in FERPA regulations is "written consent," the P.L. 94-142 regulations do not say "written."
- o Where any participating agency is also subject directly to FERPA, the FERPA restrictions apply to disclosure without consent, even to disclosure to another participating agency.

For further information, contact your Director of Special Education, State Department of Education.

MEMORANDUM

Department of Health, Education, and Welfare
Public Health Service
Health Services Administration
Indian Health Service

Date: November 30, 1977

TO: Directors, Area/Program Offices
Director, ORD, Tucson
Director, Data Processing Service Center

FROM: Director, Indian Health Service

SUBJECT: IHS Support of Education for All Handicapped Children Program

In 1975, Congress passed the Education for All Handicapped Children Act, P.L. 94-142, the purpose of which was to assure a free appropriate public education to all handicapped children. The Bureau of Indian Affairs (BIA) has the major responsibility for implementing this Act on behalf of Indian children. The goal of this act and the efforts of BIA in its implementation have my full support. I have designated Mr. Ted Marrs, MCH Consultant for the Albuquerque Area, as the project director for all matters affecting handicapped children including the IHS efforts in support of the BIA implementation of P.L. 94-142 . These efforts will be made in conjunction with the overall IHS maternal and child health focus provided by Dr. William Carlile. Dr. Marrs can be reached on FTS 474-2400.

The initial hurdle faced by BIA in implementing this program is the identification and the evaluation of Indian children that may qualify for inclusion in this program. IHS has, as a result of its operations, much information in the form of health records which can be invaluable both for identifying possibly handicapped children and the evaluation of these children. How these records could be properly utilized in light of the requirements of the Privacy Act was the topic of a November 22, 1977, meeting between representatives of BIA, IHS and their respective legal councils.

It was the concensus of that meeting that BIA, while implementing P.L. 94-142, would be a routine user of the IHS Health and Medical Records Systems as described in the **Federal Register** (42 **FR** 52182, September 29, 1977). Routine use number 3 permits these records to be disclosed to "Federal and non-federal school systems which serve American Indian and Alaska Native children for the purpose of student health maintenance." For purposes of this program, BIA is a Federal school system. Also, it is the generally held opinion in the medical community that the "health maintenance" of handicapped children includes the services mandated by P.L. 94-142. Though it was not specifically discussed at the meeting, this latter point would also be applicable to State school systems implementing the Act.

Therefore, all IHS personnel are to cooperate fully in disclosing to the BIA and its agents those IHS medical records needed for the identification and evaluation of possibly handicapped children. This cooperation is to take place in full compliance with the Privacy Act including the requirement that each disclosure to a routine user be properly documented in the individual's medical record. Such documentation is not needed when properly executed consent form covering the child is in the child's record. The use of consent forms is, therefore, preferable to reliance on the routine user test though this preference should not be used to delay implementation of the program.

Privacy Act requirements are applicable to the BIA. Therefore, Privacy Act protections cover medical records disclosed to the BIA. It is my understanding that any State implementing P.L. 94-142 must develop a State plan which includes the same Privacy Act protections that apply to Federal agencies.

In many cases, it is expected that medical evaluations of children identified under this program will be needed. The scheduling of these evaluations will have to take into account not only medical criteria and available resources but also competing non-critical routine procedures such as school and work required physicals. In scheduling medical evaluations under this Act, you should consider both the mandatory target dates of the Education for All Handicapped Children program and the possible long-term beneficial consequences for the child.

Please bring this memorandum to the attention of all affected personnel under your direction including Service Unit Directors, hospital and clinical directors and medical records personnel. Privacy Act questions concerning the implementation of this program should be directed to your respective Area or Program Privacy Act Coordinator. Questions that cannot be handled by your Privacy Act Coordinator should be directed to Mr. Mozart Spector, IHS Privacy Act Coordinator. Mr. Spector can be reached on FTS 443-1180.

The implementation of P.L. 94-142 is tied to a specific time table. Questions or problems which might delay full IHS cooperation in this important health effort are to be dealt with immediately. I have full confidence in the willingness and the desire of all IHS personnel to cooperate and I would not like this needed cooperation to suffer as a result of any question or problem over which IHS has any control.

Emery A. Johnson, M.D.
Assistant Surgeon General

MEMORANDUM

Department of Health, Education, and Welfare
Public Health Service
Health Services Administration
Indian Health Service

Date: November 30, 1977

TO: All IHS Area/Program Privacy Act Coordinators and Alternates
Thru: All IHS Area/Program Directors

FROM: IHS Privacy Act Coordinator

SUBJECT: Disclosure of Medical Information to BIA Contractors for Evaluating Handicapped Indian Children

Attached herewith is a legal opinion issued by the PHS Office of General Counsel. This opinion should guide you in handling disclosures of medical information to BIA in accordance with Public Law 94-142, "Education for All Handicapped Children Act of 1975."

If you have any questions please do not hesitate to call.

Mozart I. Spector

MEMORANDUM

Department of Health, Education, and Welfare
Office of the Secretary
Office of the General Counsel

Date: November 29, 1977

TO: Mr. Mozart Spector
Privacy Act Coordiantor
Indian Health Service

FROM: Senior Attorney
Public Health Division

SUBJECT: Privacy Act—IHS Medical Records Disclosures to BIA Contractors for Evaluating Handicapped Indian Children. (DF #16A)

This refers to the November 22, 1977, meeting among representatives of the Indian Health Service (IHS) and the Bureau of Indian Affairs (BIA) to discuss access by BIA to IHS medical records systems.

As explained at the meeting, under the Education for All handicapped Children Act of 1975 (20 U.S.C. 1401 et seq.), BIA has the responsibility of identifying and evaluating handicapped Indian children and providing each with a suitable education program. The IHS Health and Medical Records Systems (09-15-0019) contains health and medical information, including examination, diagnostic and treatment data concerning handicapped Indian children. BIA desires that its designated representatives be given access to these record systems so that BIA need not duplicate the relevant medical data already in the possession of IHS.

The Privacy Act (5U.S.C. 552a et seq.), as you know, permits certain unconsented-to disclosures including those which are disclosed for a "routine use" as listed in the system notice published in the **Federal Register** (5 U.S.C. 552a(b)(3). A routine use is defined by the Privacy Act with respect to the disclosure of a record as "the use of such record for a purpose which is compatible with the purpose for which it was collected." One of the purposes of the IHS Health and Medical Records Systems is to render appropriate medical care and treatment. In our view, disclosure of medical data for the purpose of identifying and evaluating handicapped children so that individual education programs can be developed for such children is compatible with the purpose for which the information was collected. Thus, IHS medical records may be disclosed as a "routine use" to BIA representatives for the purpose fo carrying the latter's responsibilities under the Education for All Handicapped Children Act of 1975 provided such disclosures come within a routine use published in the system notice.

The IHS Health and Medical Records System Notice (42 **FR** 52182) provides that among the routine use disclosures are those to:

> "Federal and non-federal school systems which serve American Indian and Alaskan Native children for the purpose of student health maintenance."

At the November 22 meeting, Dr. Marrs (IHS) stated, and we concur, that the development of individual education programs for handicapped children enrolled in BIA schools, which necessarily includes physical therapy and counseling, comes within the scope of "student health maintenance" as the term is used in the routine use quoted above. Thus, disclosures of IHS medical records to BIA representatives for the state purpose are authorized under an existing routine use.

At the meeting we were advised that the BIA identification and evaluation of handicapped Indian children is to be conducted by BIA contractors and that the contracts expressly provide that the contractor is subject to the Privacy Act. We are of the opinion that if BIA designates its contractors as the authorized BIA representatives of its school system to whom routine use disclosures from the IHS Health and Medical Records Systems should be made for the purpose of carrying out BIA's responsibilities under the Education for All Handicapped Children Act of 1975, then IHS may make such disclosures to the designated contractors.

The conclusions set forth in this memorandum have been discussed with and concurred in by Mr. Tim White of the Business and Administrative Law Division of this Office.

Howard Walderman